COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

17-P-1453

B.S.

vs.

L.C.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant L.C. appeals from an order denying her motion to vacate a harassment prevention order (and subsequent extension orders) issued pursuant to G. L. c. 258E. L.C. argues that the judge abused her discretion in denying the motion. We affirm.

Background. The plaintiff B.S. obtained an ex parte order pursuant to G. L. c. 258E (c. 258E order) against L.C. on December 8, 2010. A different judge extended that order for one year after hearings on December 20, 2010, and December 30, 2010. On February 2, 2011, L.C. filed an untimely notice of appeal from the December 30, 2010 order.[1] Various judges extended the order annually until 2013, when the judge that issued the original ex parte order made the c. 258E order permanent. L.C.

[1] L.C. did not move this court to enlarge her time to file this appeal until December 28, 2018.

timely appealed from the permanent order, but did not take steps to perfect her appeal. In 2015, L.C. filed a motion to vacate the original c. 258E order; the same judge that issued the permanent order denied L.C.'s motion. L.C. now appeals from that denial, claiming that there was an insufficient basis for initially issuing, and subsequently extending, the c. 258E order.

Discussion. We review for an abuse of discretion a judge's order denying a party's motion to vacate a harassment prevention order. See MacDonald v. Caruso, 467 Mass. 382, 394 (2014). See also L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014). A judge may modify or terminate a c. 258E order at either party's request. See G. L. c. 258E, § 3 (e). See also MacDonald, supra at 387. The moving party must demonstrate "a significant change in circumstances since the entry of the order that justifies termination of the order." Id. at 388. Such a change in circumstances

> "must involve more than the mere passage of time, because a judge who issues a permanent order knows that time will pass. Compliance by the defendant with the order is also not sufficient alone to constitute a significant change in circumstances, because a judge who issues a permanent order is entitled to expect that the defendant will comply with the order."

Id. at 388-389. Importantly, a "motion to terminate an order is not a motion to reconsider the entry of a final order, and does not provide an opportunity for a defendant to challenge the

underlying basis for the order or to obtain relief from errors correctable on appeal." Id. at 388.

We conclude that the judge properly denied L.C.'s motion to vacate the c. 258E permanent order because L.C. asserted no substantial change in circumstances since the entry of the previously extended order. Although L.C. claimed that the c. 258E permanent order was "no longer necessary" because "there ha[d] been no alleged contact out of court between the plaintiff and the defendant for three years," neither "the mere passage of time" nor L.C.'s legally mandated "[c]ompliance . . . with the order" would have justified vacating the c. 258E permanent order. See MacDonald, 467 Mass. at 388-389. Moreover, at the motion to vacate hearing, the judge emphasized that there had been "extensive hearings" on this matter, and found that the record supported B.S.'s contention that her interactions with L.C. were "threatening communications that placed her in fear."[2] The judge concluded that "there was enough information and enough evidence that [she] based [her] original decision on, and [she] st[ood] by it."

We further reject L.C.'s attempt to use this appeal from the judge's denial of her motion to vacate the c. 258E permanent

[2] During the motion to vacate hearing, B.S. also stated under oath that she was in fear of L.C., and had "completely changed [her] behavior" as a result of L.C.'s conduct.

order as a vehicle to challenge the legal and evidentiary basis of the initial ex parte order, and the subsequent orders extending it.[3] See MacDonald, 467 Mass. at 388. L.C. had several opportunities to challenge on appeal any purported deficiencies in each one of those extended orders. As noted, in 2011, L.C. filed an untimely appeal from the extension of the initial c. 258E ex parte order, but she failed, until December 28, 2018, to move this court to enlarge the time to file her appeal -- nearly eight years after that order issued. See note 1, supra. Although we may extend a party's time to file an appeal upon a showing of "good cause," L.C. has failed to demonstrate any "unique or extraordinary" circumstances warranting such relief.[4] See Commonwealth v. Barboza, 68 Mass. App. Ct. 180, 184 (2007). Similarly, even though L.C. filed a timely appeal from the 2013 order making the c. 258E order

[3] To the extent that L.C. challenges the initial ex parte order, that issue is not properly before us. R.S. v. A.P.B., 95 Mass. App. Ct. 372 n.1 (2019), citing V.M. v. R.B., 94 Mass. App. Ct. 522, 524-525 (2018) ("The hearing after notice is the review provided by law for an ex parte order"); C.R.S. v. J.M.S., 92 Mass. App. Ct. 561, 564 (2017).

[4] Although we may "exercise our discretion to enlarge the time for filing the notice of appeal, nunc pro tunc," L.C. has failed to meet her burden of showing good cause to grant such an enlargement. See Eyster v. Pechenik, 71 Mass. App. Ct. 773, 781 (2008) ("The appellate court maintains independent authority under Mass.R.A.P. 14[b] to extend the appellate time period, and we are not constrained by the prohibition of Mass.R.A.P. 15[c]").

permanent, she failed to perfect that appeal. In addition, L.C. should have raised any sufficiency of the evidence arguments pertaining to the 2011 or 2012 extended orders through either motions to reconsider those orders, or through direct appeals, which she failed to do, rather than attempting to exploit the judge's denial of her motion to vacate the orders as a means of "obtain[ing] relief from errors correctable on appeal."[5] See MacDonald, supra at 388.[6]

We discern no abuse of discretion in the judge's denial of L.C.'s motion to vacate the c. 258E permanent order given L.C.'s failure to demonstrate a "significant change in circumstances," and her impermissible attempt to use the judge's denial of her motion to vacate the c. 258E permanent order as a vehicle to

[5] Because L.C. failed to appeal from either the 2011 or 2012 orders extending the c. 258E order, we consider any purported errors from those orders waived.

[6] We add that there was sufficient evidence in the record of "[three] or more acts of willful and malicious conduct aimed at a specific person committed with the intent to cause fear, intimidation, abuse or damage to property and that [did] in fact cause fear, intimidation, abuse or damage to property." F.W.T. v. F.T., 93 Mass. App. Ct. 376, 377-378 (2018). B.S. testified that L.C. posted online personally identifiable information about her, "keyed" her car, stole her mail, appeared at a charity event in which L.C. knew B.S. was involved, repeatedly drove down her street, and told B.S. that her partner, J.R., was a rapist. B.S. also testified that L.C.'s conduct put her in fear, and that she installed a home alarm because she was worried about what L.C. would do. Based on that evidence, the judge could reasonably have issued the c. 258E order.

challenge the legal and evidentiary sufficiency of the original ex parte order, and each subsequent extension.[7] McDonald, 467 Mass. at 388. See L.L. v. Commonwealth, 470 Mass. at 185 n.27.

Order entered August 5, 2015, denying motion to vacate affirmed.

By the Court (Vuono, Wolohojian & McDonough, JJ.[8])

Joseph F. Stanton

Clerk

Entered: June 14, 2019.

[7] Following oral argument, we received a letter from L.C.'s counsel purportedly written pursuant to Mass. R. A. P. 16 (l), as amended, 386 Mass. 1247 (1982), and Mass. R. A. P. 22 (c), as amended, 418 Mass. 1601 (1994), as well as a letter in response from B.S.'s counsel. We have not considered the material and arguments included in L.C.'s letter because it neither cites to any "supplemental authorities," as required under rule 16 (l), nor does it address any "new matter in the [oral] arguments of" opposing counsel, as required under rule 22 (c). We add that even were we to consider L.C.'s letter, it would not change the outcome of the case.

[8] The panelists are listed in order of seniority.